BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

HEARING ON

THE IMPACT OF RAILROAD INJURY, ACCIDENT, AND DISCIPLINE POLICIES ON THE SAFETY OF AMERICA'S RAILROADS

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TESTIMONY OF

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Before the
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Good morning, Chairman Oberstar, Ranking Member Mica, and members of the Committee. For those of you who don't know me, I'm John Tolman, Vice President and National Legislative Representative of the Brotherhood of Locomotive Engineers and Trainmen, which is a Division of the Teamsters Rail Conference. On behalf of approximately 59,000 BLET members and 38,000 members of Rail Conference affiliate Brotherhood of Maintenance of Way Employes Division, I want to thank you for holding today's hearing and inviting us to address you.

The subject of today's hearing — the impact of railroad injury, accident, and discipline policies on the safety of America's railroads — is something that has been a bone of contention for Rail Conference members, and all railroad workers, for generations. At the rank-and-file level, these policies originated because of ties between the industry and the military that go back more than a century.

In the second half of the 19th Century, during the years of boom construction, many managers and executives came to the railroad directly from the military. During World War I, the railroad infrastructure was nationalized for a time, and was subordinate to military officials as part of the war effort. And when a potential strike by operating crews after World War II would have tied up the nation's transportation system, President Truman threatened to nationalize the industry again and draft the striking workers.

Indeed, this history underlies why the managerial culture in the railroad industry is known as "command and control." Accordingly, it should come as no surprise that railroads react swiftly and harshly when something goes wrong. This is true across the railroad industry: whether an incident produces an injury to a railroad worker, results in an accident, or merely involves an act or omission on the part of a worker that causes nothing more than a violation of a safety or operating rule.

It is vitally important for this Committee to understand that the industry's culture, dating back more than a century and a half, is the root of this problem. This culture manifests itself in aggressive and draconian tactics across the industry.

These tactics are among the top reasons for job dissatisfaction cited across all railroad crafts in a recently-completed survey sponsored by the Federal Railroad Administration. In the

Final Report on the survey,[1] Locomotive Engineers identified several factors that could, if improved, increase their job satisfaction, including: frequently-changing rules and "the ever-present threat of a railroad officer jumping out of a bush." *See* p. 74. Locomotive Engineers also felt the need to improve morale/relationship between labor and management. Several respondents suggest improving the relationship between labor and management. Respondents explained that they feel that management is there to discipline or fire them. One respondent felt "that a railroad hires individuals and then spends its time trying to fire them." Id. at p. 88.

Similarly, Maintenance of Way employees cited operating, safety, and FRA rules and their application as key sources of job dissatisfaction. A number of respondents expressed concern over the operating and safety rules and their application, as well as the potential for an individual to be fined for violating a FRA regulation. Specific complaints were that too many railroad rules exist; rules were always changing and, therefore, it is difficult to keep up with the rules; safety takes a back seat to being blamed for breaking a rule; and rules exist for everything. Observes one respondent, "At any given time, you can be cited for doing something wrong. That's just how many rules are out there." Respondents felt that the rules existed more to protect management than anything else. Respondents also felt that it was not fair that they could be fined for violating a FRA regulation since they work for the railroad, and they are not told what they can and cannot be fined for. Id. at p. 80.

Also cited by Maintenance of Way employees was the culture surrounding injury reporting. A number of respondents expressed frustration at the culture that encourages or rewards employees for not reporting injuries, or blames employees for sustaining the injuries. According to respondents, the employee is inevitably blamed for the injury. Notes one respondent, "Pretty much, if you get hurt, you did something wrong." Another respondent stated that the first thing his railroad does when an injury occurs is not to see if that person is OK but rather to administer a drug test. Furthermore, according to respondents, no one wants to jeopardize safety-related incentives by reporting an injury. One respondent explains, "[If] anybody gets injured, they don't want to report it. … They don't want anybody mad at them because they got hurt. So it is better to keep their mouth shut and [to] deal with it later." Id. at p. 80.

One of the tools many railroads use to harass and intimidate their workers as part of the "command and control" culture is to keep records on aspects of their performance that does not involve discipline. For example, many railroads have sophisticated systems that are used to automatically download locomotive event recorders and run the data through a computer program. If there are irregularities in any of dozens of arbitrary categories — such as fuel consumption, braking technique or throttle modulation — "points" will be assessed against the engineer. On at least one railroad, this system has been used to decertify engineers, even though there has been no violation of any of the "cardinal sins" contained in the FRA's engineer certification rule. Points also are assessed when a worker sustains an on-the-job injury, even in cases where the worker's conduct played no part in the accident that caused the injury.

[1] Reinach, Stephen, and Viale, Alex, *An Examination of Employee Recruitment and Retention in the U.S. Railroad Industry*, FRA Office of Policy and Program Development, DOT/FRA/RRP-07/01 (August 2007).

The carriers are fond of blaming the Federal Employers' Liability Act, or FELA, as the culprit, suggesting that it is far more adversarial than other programs designed to address workplace injuries and occupational illnesses. However, the facts prove otherwise — that the railroads are wrong — for two reasons.

First, injured railroad workers seek the assistance of an attorney in only a minority of cases. In fact, a number of studies have been done, dating back years, which show that the percentage of cases in which an attorney is involved in a FELA matter is significantly smaller than the percentage of workers' compensation cases in which an attorney is retained, in many states. Moreover, the overwhelming majority of FELA claims are settled short of a jury verdict. You will hear from witnesses today who are far more qualified than me to address this subject in detail.

Second, if the industry's argument was valid, then we would expect to see noticeably more lenient responses by railroads in cases of accidents where no personal injuries are sustained and in disciplinary matters, as compared to those involving an injury or a fatality. That, simply, is not the case.

For example, when the Federal Railroad Administration ("FRA") first published its Final Rule governing locomotive engineer certification in 1991, the industry's "command and control" culture went into overdrive, and scores of locomotive engineers found their certification revoked for incidents that would not have triggered any disciplinary action whatsoever in the past. In fact, a number of railroads revoked certifications for speeding when the alleged excess speed fell within FRA's regulatory margin of error for locomotive speed indicators.

The level of aggressiveness on the part of the carriers forced FRA to reopen the rule for major revision barely a year and a half after it went into effect. On April 9, 1993, FRA published an Interim Final Rule that significantly scaled back some of the revocable offenses and clarified the others. FRA noted that railroads "have in some cases decertified employees where FRA had not anticipated such actions," and that "given the experience FRA now has acquired and the need to prevent further revocations for offenses so minor that FRA had not anticipated their being the basis for revocation, FRA has decided to act quickly to correct the situation." 58 FR 18987.

Although the industry has been hemmed in somewhat by FRA in terms of locomotive engineer certification, "command and control" remains the firm philosophy in matters of railroad discipline of workers. According to the June 27th Report of the Senate Appropriations Committee on S. 1710, Railway Labor Act Section 3 arbitration — much, if not most, of which involves discipline appeals — consumes an average of 30 months per case, and "the funding for arbitration cases routinely runs out several months before the end of the fiscal year" because of caseloads. *See* S. Rep. 110–107 at p. 290.

It doesn't matter whether an event involves an injury, an accident, or merely is a disciplinary matter. The industry's response is swift and harsh; that's what "command and control" is all about.

You will doubtless hear from industry representatives the following three-note chord. First, that there is no problem that AAR's legislative agenda won't fix. Second, if there are any problems they are small and infrequent and management looks forward to working with labor to solve them. And third, what labor wants you to do is micromanage the industry.

That should sound familiar, because it is the same chord the industry plays every time it appears before this Committee. It has been the industry's response to your questions about why nothing has been done about fatigue and limbo time. It has been the industry's response to your questions about why 40% of the nation's rail infrastructure still is dark territory, when centralized traffic control technology has been mature since the 1960s. It has been the industry's response to your questions about rail safety in general.

By passing H.R. 2095, you have acknowledged the industry's failure to voluntarily come to grips with the manner in which it mistreats its workforce in safety matters. And, indeed, in Section 606, you have gone a long way to leveling the playing field in terms of how the industry's "command and control" culture impacts injury, accident, and discipline policies. I cannot urge you strongly enough to maintain the position you have staked out in Section 606, because the current system is broken and beyond repair.

In 1996, the FRA amended 49 CFR Part 225 — governing reporting, classifying, and investigating railroad accidents and incidents — by requiring railroads to adopt and comply with written Internal Control Plans ("ICPs"). These ICPs are supposed to include a

> policy statement declaring the railroad's commitment to complete and accurate reporting of all accidents, incidents, injuries, and occupational illnesses arising from the operation of the railroad, to full compliance with the letter and spirit of FRA's accident reporting regulations, and to the principle, in absolute terms, that harassment or intimidation of any person that is calculated to discourage or prevent such person from receiving proper medical treatment or from reporting such accident, incident, injury or illness will not be permitted or tolerated and will result in some stated disciplinary action against any employee, supervisor, manager, or officer of the railroad committing such harassment or intimidation.

49 CFR § 225.33(a)(1).

When this provision was first promulgated, we were optimistic that it would have a positive impact on the "command and control" railroad culture. In more than a decade of its existence, this regulatory requirement hasn't even put a dent in the problem, as many of the witnesses today will tell you. In hindsight, we shouldn't have been surprised that this requirement would not improve the situation.

After all, there are not even enough FRA inspectors to maintain an appropriate level of oversight of infrastructure, equipment, and operating practices, much less delve into the "he said/she said" world of harassment and intimidation that vigorous enforcement of Section 225.33 would entail. Moreover, we believe only harm to FRA's reputation would result if it repeatedly insinuated itself between workers and management in order to adjudicate workers' legal rights.

In recent years, FRA has worked hard to develop alternatives to the "command and control culture." A number of these initiatives — such as the Confidential Close Calls Reporting System — involve developing data on so-called "precursor" events; unnoticed and unreported mistakes that do not lead to an accident or incident, but could easily do so. These programs operate on a pair of axes that are foreign to this industry: (1) absolute confidentiality for reporters, and (2) a guaranteed non-punitive response for reported events.

Central to the success of these types of risk reduction programs is FRA's involvement as an honest broker. Indeed, while these programs continue to be rejected by the majority of those who oversee the "command and control" culture of the railroad industry, FRA has steadfastly pushed labor and management alike to view these programs with an open mind. In our view, success for these types of programs will produce a far greater improvement in safety than FRA involvement in harassment and intimidation allegations.

Likewise — and as we've testified in the past — arbitrating 49 USC Section 20109 disputes under Section 3 of the Railway Labor Act also has proven to be a failure. Until just recently, the only time punitive damages could be awarded is when the "form of discrimination … does not involve discharge, suspension, or another action affecting pay," which almost never would occur in this industry. Thus, the damages aspect of a Section 20109 case historically has been indistinguishable from any other disciplinary matter.

We believe Section 606 strikes an appropriate balance, in two respects. First, it guarantees the right to prompt medical attention. And, second, the bill makes it unlawful for a railroad to interfere in the relationship between an injured railroad worker and his or her doctor. This provision will counter one of the most egregious aspects of the "command and control" culture.

There is one more subject I want to address, which is the E. H. Harriman Award. I'm sure many of the railroad representatives who appear today will tell you about how many times their railroad won it. To us, the Harriman Award is symptomatic of the problem with the "command and control" culture, and not emblematic of industry safety. I say this because the most consistent "winners" also happen to be the railroads that are most often anecdotally identified as engaging in harassment and intimidation of injured railroad workers.

In conclusion, the 19th Century ended over 107 years ago. It is time to bring the treatment of railroad workers into the 21st Century. The culture of the industry must change now. Together, we must share ideas and cooperate to implement programs where labor is treated as an equal partner throughout the industry, and workers are considered a valued resource, not a disposable commodity.

Thank you, once again, for the opportunity to testify today, and I'll be happy to try to answer any questions you may have of me.